United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2053-4

To be argued by
JAMES R. HAWKINS, II

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2053
Docket No. 74-2054

GEORGE KATZ,
Plaintiff-Appellee,

against

REALTY EQUITIES CORPORATION OF NEW YORK *et al.*,
Defendants-Appellees,

and

KLEIN, HINDS & FINKE

and

ALEXANDER GRANT & COMPANY
Defendants-Appellants.

KENNETH I. HERMAN, Trustee
F/B/O SHERIL ESTA KUPFER,
Plaintiff-Appellee,

against

REPUBLIC NATIONAL LIFE INSURANCE COMPANY *et al.*,
Defendants-Appellees,

and

KLEIN, HINDS & FINKE

and

ALEXANDER GRANT & COMPANY
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS KLEIN, HINDS & FINKE AND ALEXANDER GRANT & COMPANY

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Preliminary Statement

This brief is submitted on behalf of defendants-appellants, Klein, Hinds & Finke ("KHF") and Alexander Grant &

Company ("Grant") in reply to the answering briefs of plaintiff-appellee Kenneth I. Herman ("Herman"), plaintiffs-appellees, by liaison counsel, and certain defendants-appellees.

ARGUMENT

Garber v. Randell is controlling.

Appellees uniformly do not distinguish *Garber v. Randell*, 477 F.2d 711 (2d Cir. 1973). It is indistinguishable and therefore controlling. Appellees try to rely upon the cautionary footnote language in the Court's opinion, but their reliance is misplaced. (See 477 F.2d at 717, n.4.) This case is so similar to *Garber* that the footnote reservation can not be employed without destroying the principle of the decision.

In *Garber* the Court noted that there were three consolidated class and derivative actions; 58 defendants; appellant therein, White & Case, was a party to only one action; the complaint sought redress against most defendants for acts which occurred between April, 1968 and March 1, 1970; the named defendants included directors and officers, independent auditors, public relations firms and investment bankers; the allegations against White & Case were limited to a short period; and White & Case did not profit from the alleged wrongdoing. 477 F.2d at 713-714.

Here there are seventeen consolidated class and derivative actions; KHF and Grant have been named and served in only two actions; there are 31 defendants which include Republic National Life Insurance Co., its officers and directors, Realty Equities Corporation of New York, its officers and directors, auditors, banks, a stock exchange and a real estate appraiser (133a-138a[1]); the amended consolidated complaint seeks redress against most defendants for acts which occurred between September, 1970 and March 8, 1974

1. References in this form are to the Joint Appendix.

(139a); the claim against KHF and Grant is limited to less than 3 months of 1970 (Plaintiffs-Appellees Brief, p. 6); and it is not claimed that KHF and Grant derived any monetary gain from their alleged wrongdoing (159a).

In addition to these compelling similarities, the appellees' arguments demonstrate the wisdom of this Court's decision in *Garber*, and further, confirm the prejudice the amended consolidated complaint will cause KHF and Grant. Before the District Court (92a) and in their principal brief KHF and Grant objected to the merger of two claims with many others. Plaintiffs-appellees have now advised that all plaintiffs, save one, have affirmatively decided to assert claims against KHF and Grant (Plaintiffs-Appellees Brief p. 11). Thus, according to its draftsmen, the amended consolidated complaint caused a merger of separate claims against KHF and Grant. The Supreme Court declared that to be improper in *Johnson v. Manhattan Ry.*, 289 U.S. 479 (1933). In *Garber* this Court reaffirmed that principle.

Defendants-appellees also contend that if there were no consolidation they would become "bogged down in a procedural morass" and a "blizzard of purposeless paper" (Defendants-Appellees Brief pp. 4-5). However, some of the parties and subscribing attorneys to that brief are fully familiar with the National Student Marketing Litigation, but they do not identify any morass or blizzard that was caused by this Court's decision in *Garber*. Counsel for Herman is a named plaintiff in the National Student Marketing Litigation and he does not even suggest any hardship from the *Garber* decision.

All appellees point out that KHF and Grant supported consolidated discovery, but objected to the filing of a single consolidated complaint in these seventeen actions. They argue, by inference, that this is inconsistent. However, the

position of KHF and Grant is totally consistent with the opinion in *Garber*. There the Court affirmed the consolidation, but reversed the order of the district court "to the extent that it directs the filing of a consolidated complaint." 477 F.2d at 718.

Appellees also uniformly rely on a statement by the District Court that "a single consolidated complaint need not necessarily foreclose the use of individual complaints at a trial" (97a-98a). This statement contradicts the aspirations of appellees to avoid procedural morasses and blizzards of paper. Furthermore, if discovery, class action motions and decisions, motions to dismiss, and for accelerated judgment are based on the amended consolidated complaint, what meaning, purpose or function can the individual complaints have at trial? In point of fact, as all counsel know, and the District Court has clearly indicated, that the filing of the amended consolidated complaint can only cause the original actions to be shuffled together once and for all. As the District Court noted:

> "While I have not said there will be a merged trial, I think that there are sufficient indications now to indicate that there will be a merged trial unless that seems unfair as a result of the pretrial proceedings. It just doesn't make much sense to try 12 different, or 14 different, cases 14 different times when there is only one point." (94a)

None of the appellees suggest any prejudice to themselves from the relief KHF and Grant seek, despite the experience of some in the National Student Marketing Litigation. In *Garber* this Court held, "We reverse the district court's consolidation order insofar as it directs that a consolidated complaint be filed against W & C." 477 F.2d at 717. If the appellees wish to proceed, *inter se*, under the amended consolidated complaint, they may do so. The relief granted

in *Garber* is totally consistent with appellees' wishes and the protection of KHF and Grant.

Finally, with respect to the automatic cross-claim provisions of the District Court's order, defendants-appellees suggest that any counsel worth his salt will assert precautionary cross-claims against all other parties (Defendants-Appellees Brief p. 5). That does not seem to be the "good ground" required under Rule 11 of the Federal Rules of Civil Procedure.

Conclusion

Insofar as the order below directed the filing of a consolidated complaint against KHF and Grant it should be reversed.

Respectfully submitted,

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Dated: New York, New York
January 10, 1975

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK,

COUNTY OF NEW YORK.

The undersigned being duly sworn deposes and says:

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Lillian De Mayo

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Commission Expires March 30, 1976